

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

IN RE: DEPUY ORTHOPAEDICS, INC.
PINNACLE HIP IMPLANT PRODUCTS
LIABILITY LITIGATION

MDL No. 2244

Honorable Ed Kinkeade

This Document Relates To:

*Aoki – 3:13-cv-01071-K
Christopher – 3:14-cv-01994-K
Greer – 3:12-cv-01672-K
Klusmann – 3:11-cv-02800-K
Peterson – 3:11-cv-01941-K
Thibodeau – 3:13-cv-01027-K*

**PLAINTIFFS' SUR-REPLY IN OPPOSITION TO
DEFENDANTS' MOTION TO AMEND SECOND AMENDED
ORDER ON BELLWETHER TRIALS**

Defendants continue to complain about the inclusion of bellwether plaintiffs for whom their expert, Dr. Heinrich was a treating physician. Their request to exclude plaintiffs Aoki, Klusmann and Peterson should be rejected for the following reasons.

First, every bellwether trial and verdict is instructive for the overall MDL. The facts and issues that arise allow the parties to receive guidance from the Court on motion practice for future trials (whether in additional bellwether trials or post-remand trials), to gain insight regarding the effectiveness of various fact and expert witnesses, and to further refine the trial plan and exhibits, all of which increase the efficiency of future trials. Including the claims of Aoki,

Klusmann and Peterson in the upcoming bellwether trial will not detract from and instead will contribute to of those benefits.

Second, Defendants suggest that Dr. Heinrich's status as both a treating physician for these three plaintiffs, and a defense expert, is somehow unique or anomalous, but that is simply not correct. Based on a review of submitted Plaintiff Fact Sheets, there are 25 other cases pending in this MDL where Dr. Heinrich was the implanting surgeon, revising surgeon, or both.

Further, Defendants have designated several other orthopaedic surgeons as experts in the upcoming trial: Dr. William Barrett, Dr. Andy Engh, Dr. Thomas Fehring, Dr. William Griffin, Dr. Brian Haas, Dr. Kirk Kindsfater, Dr. Thomas Schmalzried, and Dr. Raymond Wasielewski. Defendants have had a long and very close relationship with each of these doctors that has involved the payment of substantial sums of money – just like Dr. Heinrich. Each of these surgeons have patients who have filed claims in this MDL: three for Dr. Barrett, 11 for Dr. Engh, one for Dr. Fehring, 12 for Dr. Griffin, 23 for Dr. Haas, 25 for Dr. Kindsfater, two for Dr. Schmalzried, and 1 for Dr. Wasielewski. Therefore, in addition to being representative of the claims as a whole in this MDL, the claims of Aoki, Klusmann and Peterson are also representative of this sub-group of 78 cases – not an insubstantial number. Consequently, the inclusion of these

plaintiffs' claims in this trial will not be a "waste of time and resources" as Defendants mistakenly contend.

It was the Defendants who injected Dr. Heinrich into this litigation, not the plaintiffs. What concerns Defendants is not that the jury will somehow be confused in this case, but rather that the jury will see very clearly how Defendants have used so-called "independent" orthopaedic surgeons to promote their products for monetary gain, at the expense of and detriment to patient safety. Their efforts to eliminate the claims of Aoki, Klusmann and Peterson should be rejected for what they truly are: an attempt to avoid inconvenient facts. It is also a rather transparent attempt to generally reduce the number of bellwether plaintiffs for the January 2016 trial which has been the Defendants' goal since the inception of the process.

For the reasons stated, Plaintiffs pray that this Court deny Defendants' motion and retain Aoki, Klusmann and Peterson as bellwether plaintiffs for the upcoming trial.

Dated: November 24, 2015

Respectfully submitted,

Plaintiffs' Co-Lead Counsel:

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CERTIFICATE OF SERVICE

I certify that the foregoing instrument was served on all counsel of record by the Court's CM/ECF system, and was also forwarded to counsel for the Defendants by electronic mail on November 24, 2015.

/s/ Justin Presnal